IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9198 OF 2005

Ananda Shripati Sutar, since deceased through LRs. Petitioners

versus

Anandrao Laxman Jadhav, since deceased through heirs Respondents

ALONG WITH
WRIT PETITION NO.9336 OF 2005

Haribai Pandurang Patil, since deceased through LRs. Petitioners

versus

Anandrao Laxman Jadhav, since deceased through LRs. Respondents.

Shri N.J.Patil for petitioners.
Shri Amit Borkar for respondent no.1a.
Shri A.H.Palekar, AGP for State.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 23rd January 2006

PC :

1. Heard learned counsel appearing for parties.

2. By these petitions under Article 227 of Constitution of India the petitioners, who are original Appellants in Appeals preferred by them to challenge a permission granted by the

Competent Authority under the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971 (for the sake of brevity hereinafter referred to as "Slum Act"), impugn an order passed by the learned Divisional Commissioner, Pune, dismissing their appeals and confirming orders of the Competent Authority. The effect of dismissal is that the permission granted by the Competent Authority in favour of Respondent nos.1 2 and 2a to execute a decree for possession passed by the Civil Court, stands confirmed. As a result, petitioners who are Judgement Debtors, would be dispossessed in execution proceedings and the premises in their possession would have to be handed over to respondents 1, 2 and 2a.

3. It is not necessary to refer to the facts in any details because it appears to be an admitted position that the Decree Holders had preferred an application seeking permission to execute a decree for possession passed in their favour. The premises being slum area, such permission is required under section 22 of the Slum Act. Provisions of Section 22 of the Slum Act insofar as relevant to the case in hand, read thus:-

22. Proceedings for eviction of occupiers or for issue of distress warrant not to be taken without permission of Competent Authority :-

(1) Notwithstanding anything contained in any other law for the time being in force, no person shall except with the previous permission in writing of the Competent Authority,-

(a) ... ...

(b) when any decree or order is obtained in any suit or proceeding instituted before such commencement for the eviction of an occupier from any building or land in such area or for recovery of any arrears of rent or compensation from such occupier, or for both execute such decree or order; or ... ...

(2) Every person desiring to obtain the permission referred to in sub section (1) or (1-A) shall make an application in writing to the Competent Authority in such form and containing such particulars as may be prescribed.

(3) On receipt of such application, the Competent Authority, after giving an opportunity to the parties of being heard and after making such summary inquiry into the circumstances of the case as it thinks fit, shall, by order in writing, either grant or refuse to grant such permission.

(4) In granting or refusing to grant the permission under clause (a) or (b) of sub section (1) or clause (a) of sub section (1-A), the Competent Authority shall take into account the following factors, namely :-

(a) whether alternative accommodation within the means of the occupier would be available to him, if he were evicted;

(b) whether the eviction is in

> the interest of improvement and clearance of the slum area;
>
> (b-1) whether, having regard to the relevant circumstances of each case, the total amount of arrears of rent or compensation and the period for which it is due and the capacity of the occupier to pay the same, the occupier is ready and willing to pay the whole of the amount of arrears of rent or compensation by reasonable instalments within a stipulated time;
>
> (c) any other factors, if any, as may be prescribed."

4. Against the order passed by the Competent Authority granting permission under the aforesaid provisions, an appeal lies under section 35 of the Slum Act, which reads thus :-

> "35. Appeals :-
>
> (1) Except as otherwise expressly provided in this Act, any person aggrieved by any notice, order or direction issued or given by the Competent Authority may appeal to the Administrator within a period of thirty days from the date of issue of such notice, order or direction.
>
> (2) Every appeal under this Act shall be made by petition in writing accompanied by a copy of the notice, order or direction appealed against.
>
> (3) On the admission of an appeal, all proceedings to enforce the notice, order or direction and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the

> appeal; and if the notice, order or direction is set aside on appeal, disobedience thereto shall not be deemed to be an offence.
>
> (4) No appeal shall be decided under this section unless the appellant had been heard or has had a reasonable opportunity of being heard in person or through a legal practitioner.
>
> (5) The decision of the Administrator on appeal shall be final and shall not be questioned in any court."

5. In the present case, it may be true that the matter has a chequered history and the respondents referred to above have been unable to execute a decree passed in their favour in a suit instituted prior to the Slum Act being promulgated. It is equally true that they are not in a position to enjoy the fruits of the decree passed in their favour. However, from a reading of the order impugned in this petition, it appears to me that the Divisional Commissioner, Pune Division has not bothered to adhere to the directions issued by this Court in Writ Petition Nos.4725 of 2005 and 4738 of 2005 which are between same parties. This Court in its order observed thus :-

> "3. The petitions are directed against the order passed by the learned Divisional Commissioner, Pune Division,

> Pune under section 35 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act of 1971; hereinafter referred to as the 'Act'. The petitioners have suffered a decree of civil court, which is sought to be executed by the respondents. The respondents applied for permission to do so under section 22 of the Act. This permission was granted by the Municipal Commissioner, Kolhapur on 17th June, 1991 as per Exh.'A' to W.P.Nos.4725 and 4738 of 2005 and on 4th June, 1991 as per Exh.'A' to W.P.No.4738/2005. Against these orders, the petitioners have filed respective appeals, which appear to have been delayed by about 33 days.
>
> 4. Having heard the learned counsel for the petitioners, I am of view that there is sufficient cause for condoning the delay in filing the respective appeals and the delay is hereby condoned.
>
> 5. The learned Divisional Commissioner, Pune is directed to decide the matters on merit as expeditiously as possible in any case not later than two months from the date the parties appear before him. ... ..."

6. The order under challenge before this Court in the aforesaid petitions was passed on 29th April 2005. The order refused to condone delay in filing appeals which were filed by the petitioners herein. At the same time, the appellate authority made observations on merits of the matter. This Court set aside these orders, condoned the delay and directed that the appeal be heard on merits. In the orders which were set aside, the observations on merits read

thus:-

> "... ... ... The merits of the case were examined twice by the learned Lower Court, once on the original application and secondly on remand. Both the parties were given ample opportunity to adduce evidence and make arguments on both the occasions. The learned Lower Court, on both the occasions, has recorded a finding that the application moved by the present respondents for executing the decree of the Civil Court was tenable. Advocate Joshi has not been able to offer any strong and compelling grounds for interfering with the finding of the Lower Court on merits. As observed earlier, this litigation has a long and chequered history, starting from the Civil suit filed by the present Respondents in the year 1968. Had the decree granted by the Civil Court, been executed before declaration of the suit property as a 'slum' under the provisions of the Slum Act, there would have been no reason or rationale for the present round of litigation under the Slum Act. However, the present Respondents Nos.2 and 3 started the execution proceedings in the year 1979 by which time, the suit property was declared as a 'slum'. For this reason they were required to obtain a permission from the Competent Authority under the provisions of the Slum Act. The Appellants have failed to make out a case for refusing permission for execution of the decree of the Civil Court and hence the lower court has rightly upheld the application. It is also pertinent to note that the order of the Civil Court (in the year 1968) for eviction and possession was not challenged in appeal by the present Appellants. They kept silent till the year 1979 when the present Respondents initiated darkhast proceedings. On merits, therefore, I do not see any reason to interfere with the impugned order."

7. Upon remand, the Divisional Commissioner, Pune by the order which is under challenge in the present petition and passed on 30th November 2005, in paragraph 4.1, has made same observations which have been reproduced above by me.

8. It is unfortunate that the appellate authority despite this Court directing it to decide the matter afresh and in accordance with law, chooses not to refer to any materials produced by parties in support of their respective contentions but rests its conclusions by conveniently reproducing the very same observations which were subject matter of challenge and form part of the earlier order dated 29th April 2005. It is pertinent to note that the Divisional Commissioner, Pune, high powered as he is, is chosen as an appellate authority. The Legislature expects it to scrutinise the matter as an Appellate authority, independently and impartially. This scrutiny should be consistent with the object of enacting the Slum Act providing therein requirement of permission to execute the decree for possession in respect of premises in Slum Area. It is not

as if Section 22 achieves no purpose. The Legislature has provided for permission so that persons residing in Slum areas are not thrown on the streets. While granting permission, Section 22 obliges the Competent Authority to take into account the factors enumerated therein. The order of the Competent Authority has not been given finality advisedly. It is made subject matter of further scrutiny in appeal at the hands of a high powered official designated as Appellate Authority. In Patesinghrao Anandrao Naik and others Vs. R.V.Deshmukh, Joint Director and Joint Registrar, Co-op. Societies and others, reported in 1981-Mh.L.J.-936 in the context of remedy of an appeal, a Division Bench of this Court had to observe thus:-

> "25. As observed in Pandit Bhullan's case an appeal is a creation of statute. Further there is a vast difference between the revisional powers and the appellate powers. An appeal, as stated by Lord Davery in Pannamma v. Arumoosa is a proceeding in which a question is whether the order of the Court from which the appeal is brought was right on the materials which the Court had before it. In Legal Parlance appeal means judicial examination of the decision by the higher Court of an inferior Court. It amounts to, in essence and pith, a complaint to higher forum that the decision of the subordinate tribunal is erroneous and therefore liable to be rectified or set aside. From this it would follow that an

> appellate Court has power to go not only into the question of law, but also into questions of fact. Such a power would further enable the appellate Court to review or reassess the entire evidence and come to its own conclusion. Litigant is entitled to a full, fair and independent consideration of evidence and the material at the appellate stage. Under section 152 of the Act, right of appeal is provided in very wide and general terms. The appellate authority has to decide the appeal as a quasi-judicial authority. To say the least the appellate authority cannot act mechanically as a mere rubber stamp. In the present case in memorandum of appeal various substantial questions of fact were raised by the appellants. All these contentions are disposed of by the appellate authority by observing :
>
> > "I have gone through the appeal memo, the records produced before me. The Joint Director has given sufficient reasons in para 5 of his order why the action of supersession is necessary. It is not necessary for me again to reproduce all these facts. I totally agree with him. I therefore, pass the following order."

9. Borrowing the words and using the phraseology of the Division Bench namely that the Appellate Authority is not a "Rubber Stamp" but is obliged to independently scrutinise the legality and validity of orders challenged and impugned before it, I find that above observations apply squarely to the facts and circumstances of the present case.

10. In the present case, the Appellate Authority has treated the matter rather casually and taken the entire proceedings lightly without in any manner being aware of the responsibility and obligations caste by law. Once the order was set aside by this Court, it was not open for the Appellate Authority to have relied upon the observations which are reproduced above.

11. Shri Borkar appearing for the contesting respondents and Shri Palekar - learned AGP could not dispute that the earlier order and observations therein on merits, have been reproduced in the present order as well. There is no independent scrutiny of the materials including the pleas raised by the respondents, that the petitioners have alternate accommodation which is convenient to them and which in fact has been handed over to third parties. Such was the seriousness of the matter. When the petitioners are apprehending that they would loose possession and equally the respondents are accusing them of adopting delaying tactics, it was incumbent on the Appellate Authority to have independently applied its mind. It is unfortunate that the contesting respondents have to suffer because of a serious lacuna on the part of the Appellate

Authority.

12. In the light of the observations in the impugned order, it is not possible to accept the contention of Shri Borkar that the petitioners-original appellants do not deserve any further opportunity.

13. Such arguments being accepted and countenanced would mean that this Court is not serious about the implementation of its orders and directions. It is not for the parties to go around supporting observations made in their favour, after it is noticed by this Court that orders are unsustainable in law. The impugned order is vitiated by total non application of mind and suffers from an obvious error, as pointed out above.

14. The reliance placed by Shri Borkar on two decisions of Hon'ble Supreme Court namely {1976}1-SCC-810 - The Hindustan Construction Co. Ltd. Vs. Shri G.K.Patankar and another and AIR-2004-SC-3224 - State of Punjab Vs. Savinderjit Kaur is misplaced. They set out well settled principle that merely because some legal infirmity is noticed in an order, it is not

necessary that the Court should exercise it's supervisory powers once it concludes that substantial justice is done. These observations have been made in peculiar facts and circumstances when serious prejudice is not established. In the present case, when the entire remedy of appeal is rendered infructuous and meaningless by the approach of the Appellate Authority, the observations of the Hon'ble Supreme Court in the decisions brought to my notice can hardly apply. They were made in the context when substantial and serious prejudice was not caused but an attempt of the petitioners therein was to revive an illegal order under the garb of invoking the High Court's jurisdiction under Article 226 and that of the Supreme Court under Article 136 of the Constitution of India.

15. In my view, serious prejudice has been established and it is writ large because the appeal, as observed by me above, has been disposed of in most casual manner. I have no alternative but to set aside the order passed by the Appellate Authority/Divisional Commissioner, Pune in each of these appeals. Accordingly, the order of Divisional Commissioner, Pune Division impugned in these petitions stands set aside.

The appeals be reheard by the Appellate Authority.

16. When these matters were adjourned on the earlier occasion, considering the approach of the Divisional Commissioner, Pune, I inquired from the learned AGP as to whether any other Officer of equivalent or higher rank can be designated by the State Government to hear the appeals. This query was raised because, in my view, the Divisional Commissioner has predetermined the issues. He has passed two to three orders already against the petitioners. It is settled principle that justice must not only be done but seen to be done. Honouring that principle, I direct that these appeals shall be heard by the Divisional Commissioner, Mumbai on merits and in accordance with law uninfluenced by any observations made in the orders dated 29th April 2005 and 30th November 2005.

17. All contentions on merits of the matter are expressly kept open and this Court has not gone into the same but has set aside the orders under challenge only because an obligation cast on the Appellate Authority in law has not been followed.

18. Parties to appear before the Divisional Commissioner, Mumbai on 7th February 2006 and the Appellate Authority shall endeavour to dispose of these appeals on merits and in accordance with law, after hearing parties, within a period of three weeks from the date of their appearance. No order as to costs. Records of pending appeals, which are in the office of Divisional Commissioner, Pune, shall be transmitted and made available for the Divisional Commissioner, Mumbai on the date fixed for appearance of parties.

(S.C.DHARMADHIKARI, J.)